

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOAQUIN BASURTO-ESPINO,

Defendant.

NO. CR-09-2046-EFS
CV-11-3074-EFS

**ORDER DENYING DEFENDANT'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE PURSUANT
TO 28 U.S.C. § 2255**

Before the Court, without oral argument, is Defendant Joaquin Basurto-Espino's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. ECF No. [68](#). For the reasons discussed below, the Court denies Defendant's motion.

I. BACKGROUND

Defendant was indicted on April 14, 2009, for being an Alien in the United States after Deportation in violation of 8 U.S.C. § 1326. ECF No. [1](#). Defendant entered into a Plea Agreement with the United States Attorney's Office (USAO), which the Court accepted on August 13, 2009. ECF No. [17](#). On January 13, 2010, Defendant was sentenced to a term of imprisonment of fifty-seven months, a supervised release period of two years, and a one-hundred dollar special penalty assessment. ECF Nos. [43](#) & [45](#). Defendant's sentence was based on a criminal history of IV (after

1 downward departure) and a total offense level of 21; his sentence was at
2 the low end of the fifty-seven to seventy-one month range.

3 Defendant has made several post-conviction motions. On December 29,
4 2010, the Court denied Defendant's Motion to Modify Sentence Pursuant to
5 3582(c)(B)(2). ECF No. [59](#). On February 23, 2011, the Court denied
6 Defendant's Motion to Amend Pursuant to F. R. Civ. P. 15(a)(1) and
7 Defendant's Motion for Relief Pursuant to F. R. Civ. P. 60(b)(1) and (6).
8 ECF No. [64](#). On April 11, 2011, the Court denied Defendant's Motion to
9 Amend Pursuant to Court's Order. ECF No. [66](#). Defendant now seeks relief
10 from his sentence under the habeas corpus statute for prisoners in
11 federal custody, 28 U.S.C. § 2255.

12 II. DISCUSSION

13 1. Legal Standard

14 Section 2255 provides in pertinent part:

15 A prisoner in custody under sentence of a court established by
16 Act of Congress claiming the right to be released . . . may
17 move the court which imposed the sentence to vacate, set aside
18 or correct the sentence.

19 [T]he court shall . . . determine the issues and make findings
20 of fact and conclusions of law with respect to [the motion].
21 If the court finds that the judgment was rendered without
22 jurisdiction, or that the sentence imposed was not authorized
23 by law or otherwise open to collateral attack, or that there
24 has been such a denial or infringement of the constitutional
25 rights of the prisoner as to render the judgment vulnerable to
26 collateral attack, the court shall vacate and set the judgment
aside and shall . . . correct the sentence as may appear
appropriate.

23 *Id.* § 2255. In evaluating the merits of a section 2255 motion, the Court
24 should hold an evidentiary hearing unless "the motions and files and
25 records of the case conclusively show that the prisoner is entitled to
26 no relief." *Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994);

1 28 U.S.C. § 2255. "[W]hen a defendant's allegations . . . are based on
2 facts outside of the record, an evidentiary hearing is required."
3 *Frazer*, 18 F.3d at 781 (internal quotation omitted).

4 Because Defendant has not alleged any facts outside of the record,
5 the Court finds that an evidentiary hearing is not required.

6 **2. Analysis**

7 Defendant argues that because section 3553(a)(6) requires courts to
8 consider "the need to reduce unwarranted sentence disparities" among
9 similarly-situated defendants, his sentence should be reduced by 15-20
10 months to mirror the sentence he would have received if he had been
11 offered a "fast track" early disposition plea agreement. While logically
12 appealing, Defendant's argument is foreclosed by the Ninth Circuit's
13 decision in *United States v. Gonzalez-Zotelo*, 556 F.3d 736 (9th Cir.
14 2009).

15 In *Gonzalez-Zotelo*, the defendant was convicted of being an alien
16 in the United States after deportation in violation of 8 U.S.C. § 1326,
17 the same crime that Defendant was convicted of. *Gonzalez-Zotelo*, 556
18 F.3d at 738. The defendant was not offered a fast-track plea agreement,
19 but at sentencing, the district judge imposed a below-Guidelines sentence
20 in order to promote "consistency" between the defendant and another
21 individual he had sentenced for a section 1326 violation the same day.
22 *Id.* The government appealed and, finding the district court's sentencing
23 decision plainly erroneous, the Ninth Circuit vacated and remanded the
24 sentence. *Id.* at 741-42. The Ninth Circuit held that disparities
25 between sentences imposed pursuant to a fast-track plea agreement and
26 sentences imposed without such an agreement are not "unwarranted" because

1 they are authorized by Congress's approval of fast-track plea agreements
2 in the Prosecutorial Remedies and Tools Against the Exploitation of
3 Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).
4 *Id.* at 739. Such disparities are in fact "justified by the benefits
5 gained by the government when defendants plead guilty early in criminal
6 proceedings." *Id.* (quoting *United States v. Marcial-Santiago*, 447 F.3d
7 715, 719 (9th Cir. 2006)); see also *United States v. Perez-Pena*, 453 F.3d
8 236, 244 (4th Cir. 2006) ("If defendants in fast-track districts expected
9 to receive similar sentences regardless of whether they participated in
10 a program, defendants would have little incentive to participate."). The
11 Ninth Circuit further reasoned that its holding in *Marcial-Santiago* was
12 not undercut by the Supreme Court's ruling in *Kimbrough v. United States*,
13 552 U.S. 85 (2007), because "[w]hile *Kimbrough* permits a district court
14 to consider its policy disagreements with the Guidelines, it does not
15 authorize a district judge to take into account his disagreements with
16 congressional policy." 556 F.3d at 741. If downward departures for
17 disparities between fast-track and non-fast-track defendants are
18 prohibited at the time of sentencing under *Gonzalez-Zotelo* and *Marcial-*
19 *Santiago*, the Court finds that an order modifying a sentence for such a
20 disparity would be equally, if not more, improper in the context of a
21 section 2255 habeas petition.

22 In sum, Defendant has not shown that his sentence was imposed in
23 violation of the Constitution or laws of the United States, that the
24 Court was without jurisdiction to impose his sentence, or that the
25 sentence was not authorized by law or otherwise open to collateral
26 attack. Because Defendant did not reach a fast-track plea agreement with

1 the USAO, the Court did not consider the range Defendant would have
2 received under such an agreement at sentencing, and it declines to do so
3 today.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1) Defendant Joaquin Basurto-Espino's Motion to Vacate, Set Aside,
6 or Correct Sentence Pursuant to 28 U.S.C. § 2255, **ECF No. 68**, is **DENIED**.

7 2) This file shall be **CLOSED**.

8 **IT IS SO ORDERED.** The District Court Executive is directed to enter
9 this Order and provide a copy to Defendant and the United States
10 Attorney's Office.

11 **DATED** this 2ND day of September, 2011.

12
13 s/Edward F. Shea

14 EDWARD F. SHEA

15 United States District Judge

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